IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

(Chapter VIII, Rule 32(2) (b)

Description of Case

Writ Petition No. 189 of 2007 (S/B)
(Old No. 2454 of 1994)

Date of decision : 12th December, 2007

A.F.R. (Approved for Reporting)

~~Not approved for reporting~~

Date : 12.12.2007 Initials of Judge

Note : Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

HIGH COURT OF UTTARAKHAND, AT NAINITAL

Writ Petition No. 189 of 2007 (S/B)
(Old No.2454 of 1994)

1. State of U.P.
   Through Secretary to Government, Irrigation Department, Civil Secretariat, Lucknow
2. Engineer-in-Chief, Irrigation Department, Uttar Pradesh, Lucknow
3. Sri B.K. Govil, Superintending Engineer Haldwani, Jamrani Dam, Construction Circle District Nainital
4. Executive Engineer, Jamrani Dam, Construction Division III, Haldwani District Nainital ... Petitioners

Versus

1. Ramesh Chandra Sanwal
   S/o Sri Madan Narain Sanwal
   R/o Two Type Quarters No. 17
   Damuan Dhoondha, Kathgodam,
   District Nainital

2. U.P. Public Services Tribunal
   Jawahar Bhawan, Lucknow ... Respondents

Mr. Subhash Upadhyaya, learned Brief Holder for the petitioners/State.
None for respondent Nos. 1 and 2.

JUDGMENT

Coram : Hon'ble Rajeev Gupta, C.J.
Hon'ble J.C.S. Rawat, J.

Per Hon'ble J.C.S. Rawat, J.

1. By means of this Writ Petition, moved under Article 226 of the Constitution of India, the petitioners have sought the following reliefs :-

> "i. Issue a writ, order or direction in the nature of certiorari quashing the impugned judgment and order dated 22.11.93., contained in Annexure no.1.
>
> ii. Issue a writ order of direction in the nature of mandamus directing the opposite parties not to give effect to the order dated 22.11.93 passed by

the Services Tribunal, during the pendency of the present writ petition.

iii. Issue any other writ, order or direction in the nature as deemed fit & proper by this Hon'ble Court in the circumstances of the case.

iv. To allow the writ petition with costs."

2. Brief facts of the case are that the respondent No.1-Ramesh Chandra Sanwal has been working on the post of Noter and Drafter at Jamrani Dam, Construction Division III, Damuan Dhoonga, Haldwani and he was also entrusted with the work of Cashier and was handling the cash work. On 01.08.1980, the respondent No.1 had gone to Bank to draw the salary amounting to Rs. 12,010.15 and the said money was lost. The respondent No.1 lodged a first information report in this regard. Thereafter, the respondent No.1 was charge sheeted and was placed under suspension but he was reinstated subsequently. Vide order dated 08.02.1982, the respondent No.1 was punished by the Superintending Engineer, Jamrani Dam, Construction Circle, Haldwani, District Nainital. It was ordered that the respondent No.1 was although reinstated but should not be paid salary of the suspension period and a recovery of Rs. 12,010.15 be done from him. It was also directed that 25% of the pay would be deducted from the salary of respondent No.1 in every month. The respondent No.1 was also debarred for promotion for two years.

3. Aggrieved by the said order, the respondent No.1 filed a claim petition before the Public Services Tribunal, U.P. on the grounds that the Superintending Engineer was not the appointing authority and therefore, the Superintending

Engineer has no right to pass the order of punishment; no notice under Fundamental Rule 54 was given to the respondent No.1; the subsistence allowances of respondent No.1 could not be withheld without a notice under aforesaid Rule 54 in the order of punishment; the respondent No. 1 was confirmed by the Engineer-in-Chief & Additional Engineer-in-Chief; and the Superintending Engineer was not competent authority to punish the respondent No.1.

4. The learned Tribunal after hearing the parties has held that as there was no prior notice to respondent No.1 before passing the order dated 08.02.1982, the said order of withholding the remaining allowance of the suspension period was in violation of the Fundamental Rule 54. So far as the punishment awarded to the respondent No.1 debarring him from promotion for two years, it was held by the Tribunal that the disciplinary authority can award only punishment which is provided in S.S.P.A.R. wherein there is no punishment like debarring him from promotion for two years, as such, this type of punishment cannot be awarded. It was further held that the disciplinary authority could be the Additional Chief Engineer in the case of respondent No.1 who confirmed him; the order of punishment has been passed by the authority Superintending Engineer who is subordinate in rank; and as such, the Superintending Engineer was not the competent authority to punish the respondent No.1. It was further held that the respondent No.1 was deprived of his rightful claim of promotion by way of malice and arbitrary manner of action of the Executive Engineer. Feeling aggrieved by the impugned order, the petitioners-department have filed the present writ petition before this Court.

5. None is appearing for the respondent No. 1.

6. Heard Sri Subhash Upadhyaya, learned Brief Holder for the State and perused the record.

7. Mr. Subhash Upadhyay, the learned Brief Holder contended that the order passed by the U.P. Public Services Tribunal is illegal and without jurisdiction; the Public Services Tribunal has failed to appreciate that the appointing authority of the respondent No.1 was Superintending Engineer; the learned Tribunal has erred in coming to the conclusion that the appointing authority of the respondent No.1 was Additional Chief Engineer only on the basis of the confirmation made by him on the post of Draughtsman. The respondent No.1 in his claim petition at para 15 has stated as under:-

> *"That the petitioner was confirmed as Routine Grade Clerk by the Engineer-in-Chief vide his order No. 668-E-4/7B. 1525 Misc. dated 5.2.70. Subsequently, the petitioner was confirmed as Noter and Drafter by the Addl. Chief Engineer vide his order No. 12092 E-4/7B-1490. Misc. dated 7.9.74. As the petitioner was confirmed by the Engineer-in-Chief and Addl. Chief Engineer as indicated above, the Superintending Engineer was not competent authority to punish the petitioner. As is clear from the O.M. dated 13.11.57 issued by the chief Secretary to Govt. of U.P., a copy of which is enclosed as Annexure V to this claim petition. Thus the order of punishment is illegal and without authority. A copy of the confirmation order of the petitioner as Noter and Drafter is enclosed as Annexure VI the claim petition."*

8. In reply of the same, the petitioners in its written statement in para 15 has admitted that the respondent No. 1 was confirmed by the Chief Engineer, Irrigation and the

petitioners have further admitted that the respondent No.1 was confirmed as Noter and Drafter by the order of the Additional Chief Engineer, Irrigation. In support of the claim petition, the respondent No.1 had filed the G.O. dated 13th Novermber, 1957 which reads as under :-

"Government of Uttar Pradesh
APPOINTMENT (B) DEPARTMENT
No.1194 / 11-B-122-1956 dated Lucknow Nov.13, 1957
OFFICE MEMORANDUM

Sub: Question whether an appointing authority can confirm the staff which was previously appointed by a superior authority in a temporary capacity.

———————————

The undersigned is directed to say that recently Government has occasion to examine, the question whether it is possible for the authority who have subsequently been delegated powers of appointment to confirm these members of the staff who were originally appointed temporarily by an authority higher than him. The position is that for the purpose of article 312 of the Constitution of India the expression "Civil Post" includes all Government Servants whether permanent or temporary. So, if a person was appointed to post, whether in permanent or temporary capacity by a particulars, authority the same authority or an authority not lower in rank than the appointing authority, can exercise the powers to dismiss or remove him from service. But where a person was appointed to a post in temporarily capacity by superior authority and subsequently orders regarding his confirmation were issued by an officer subordinate to the original appointing authority, after he was declared an appointing authority, often he was declared an appointing authority for that category of Government servant, the latter shall have the power to inflict all the punishment, including removal and dismissal on other Government servants, because the appointing authority in respect of that permanent Government servant is that authority which has passed orders of confirmation.

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9. The petitioners have relied upon the Rules framed by the State Government in exercise of its power under Article 309 of the Constitution of India in the year 1971. It is provided under Rule 20 of Uttar Pradesh Shinchai Vibhag Anusachiviya Seva Niyamawali, 1971 that the Superintending

Engineer of the Circle would be the appointing authority for their employees posted in the Circle office. It is also apparent from the perusal of the record that these Rules were enforced in the year 1971, whereas the respondent No.1 was confirmed as Routine Grade Clerk by the Engineer-in-Chief on 05.02.1970 and subsequently confirmed as Noter and Drafter by the Addl. Chief Engineer on 07.09.1974. Thus, it is apparent that the appointment of the respondent No.1 was made in the year 1970 and he had been working since then. The Respondent No.1 was confirmed by the Additional Chief Engineer as Noter and Drafter. It is evident from the perusal of G.O. dated 13th November, 1957 that the authority who confirms the employees should be the disciplinary authority for the purposes of the punishment. In the instant case, the disciplinary authority would be the Chief Engineer/Additional Chief Engineer who confirmed the respondent No.1 whereas the punishment order has been passed by the Superintending Engineer which is subordinate in rank. As such, the learned Tribunal was justified in holding that the impugned punishment order is liable to be quashed.

10. The learned Tribunal was further justified in holding that the disciplinary authority can award only punishment which has been provided under the Rules. The learned Tribunal has held that there is no rule providing the punishment like debarring the respondent No.1 from promotion for two years under the relevant Rules. The learned Tribunal quashed the impugned punishment order of debarring the respondent No.1 for being promoted for two years. Mr. Subhash Upadhyay, the learned Brief Holder could not demonstrate us in the Rules by which the delinquent employee can be debarred from promotion for further two years. Thus, we do

not find any infirmity in the said findings of the learned Tribunal.

11. The respondent No.1 in its claim petition has challenged the order dated 08.02.1982 on the ground that the remaining allowances of the suspension period could not be withheld under Rule 54 without giving prior notice to respondent No.1. It was further alleged in the claim petition that withholding the remaining allowances of the suspension period is in violation of Rule 54. Rule 54-B. of the U.P. Fundamental Rules provides as under:-

> *"54-B. (1) When a Government servant who has been suspended is reinstated or would have been so reinstated but for his retirement on superannuation while under suspension, the authority competent to order reinstatement shall consider and made a specific order –*
>
> > *(a) regarding the pay and allowances to be paid to the Government servant for the period of suspension ending with reinstatement or the date of his retirement on superannuation as the case may be; and*
> >
> > *(b) whether or not the said period shall be treated as a period spent on duty.*
>
> *(2) Notwithstanding anything contained in Rule 53, where a Government servant under suspension dies before the disciplinary or court proceeding instituted against him are concluded, the period between the date of suspension and the date of death shall be treated as duty for all purposes and his family shall be paid the full pay and allowances for that period to which he would have been entitled had he not been suspended, subject to adjustment in respect of subsistence allowances already paid.*

(3) Where the authority competent to order reinstatement is of the opinion that the suspension was wholly unjustified, the Government servant shall, subject to the provisions of sub-rule (8), to be paid the full pay and allowances to which he would have been entitled, had he not been suspended :

Provided that where such authority is of the opinion that the termination of the proceedings instituted against the Government servant had been delayed due to reasons directly attributable to the government servant, it may, after giving him an opportunity to make his representation within sixty days from the date on which the communication in this regard is served on him and after considering the representation, if any, submitted by him, direct, for reasons to be recorded in writing that the Government servant shall be paid for the period of such delay only such amount (not being the whole) of such pay and allowances as it may determine.

(4) In a case falling under sub-rule (3) the period of suspension shall be treated as a period spent on duty for all purposes.

(5) In cases other than those falling under sub-rules (2) and (3), the Government Servant shall subject to the provisions of sub-rules (8) and (9), be paid such amount (not being the whole) of the pay and allowances to which he would have been entitled had he not been suspended, as the competent authority may determine, after giving notice to the Government servant of the quantum proposed and after considering the representation, if any, submitted by him in that connection within such period (which in no case shall exceed sixty days from the date on which the notice has been served) as may be specified in the notice.

(6) Where suspension is revoked pending finalisation of the disciplinary or court proceedings, any order passed under sub-rule (1) before the conclusion of the proceedings against the Government servant, shall be reviewed on its own motion after the conclusion of the proceedings by

the authority mentioned in sub-rule (1), who shall make an order according to the provisions of sub-rule (3) or sub-rule (5), as the case may be."

(7) In a case falling under sub-rule (5) the period of suspension shall not be treated as a period spent on duty unless the competent authority specifically directs that it shall be so treated for any specified purposes :

Provided that if the Government servant desires, such authority may order that the period of suspension shall be converted into leave of any kind due and admissible to the Government servant.

(8) The payment of allowances under sub0rule (2), sub-rule (3) or sub-rule (5) shall be subject to all other conditions under which such allowances are admissible.

(9) The amount determined under the proviso to sub-rule (3) or under sub-rule (5) shall not be less than the subsistence allowance and other allowances admissible under Rule 53.

(10) Any payment made under this Rule to Government servant on his reinstatement shall be subject to adjustment of the amount, if any earned by him through an employment during the period between the date of suspension and the date of reinstatement or the date of retirement on superannuation while under suspension. Where the emoluments admissible under this Rule are equal to or less than those during the employment elsewhere, nothing shall be paid to the Government servant."

12. It is evident from the perusal of the above Rule that it is obligatory on the part of the employer to give notice to the delinquent official before passing any order to withhold the allowances of the suspension period. Learned Brief Holder could not demonstrate us that the punishing authority has

issued any notice under Rule 54 withholding allowances for the suspension period. Thus, there was no notice prior to passing of the order withholding the remaining allowances for the suspension period and the same is violative of the Fundamental Rule 54. Thus, the Tribunal was justified in holding that the order of withholding the remaining allowances of the suspension period was in violation of the fundamental Rule 54.

13. For the foregoing reasons, we are of the view that the Tribunal has rightly passed the impugned order. We do not find any infirmity in the findings recorded by the learned Tribunal.

14. It is pertinent to mention here that Mr. Subhash Upadhyay, the learned brief Holder for the petitioners referred para 4 of his petition which reads as under:-

> *"That by an order dated 8.2.1992 (Annexure-4) to the claim petition) he was punished by Superintending Engineer, Jamrani Dam, Construction Circle, Haldwani, Distt. Nainital. It was ordered that the claimant is although being reinstated but shall not be paid salary of the suspension period and a recovery of Rs. 12,010.15 be done from him, with a further direction that 25% of the pay would be deducted from his salary every month and the entry would be made in last pay certificate. The above said amount has already been deducted and claimant was given his post pensionary benefits."*

15. Thus, it is apparent that the respondent No.1 has been given promotion after the punishment was awarded. Perusal of the aforesaid para 4 of the writ petition clearly shows that the order dated 08.02.1992 had been complied with and the amount of Rs.12,010.15 has already been deducted from the

salary of the respondent No.1 and he was given the post retrial benefits. Therefore, the respondent No.1 is entitled to get the amount recovered in pursuance of the punishment order dated 08.02.1982 from the petitioners (department).

16. In view of the above, the writ petition is liable to be dismissed and is dismissed accordingly. However, it is directed that the respondent No.1 is entitled to get the amount recovered in pursuance of the punishment order dated 08.02.1982 from the petitioners/department. The petitioners (department) are directed to pay the amount so recovered from the respondent No.1-Ramesh Chandra Sanwal within a period of two months from the date of production of certified copy of this order.

17. No order as to costs.

(J.C.S. Rawat, J.) **(Rajeev Gupta, C.J.)**

Dated 12th December, 2007
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